

No. 2883.

# In the United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA and NEHALEM RIVER  
RAILROAD COMPANY, a corpora-  
tion, and A. S. KERRY,

*Appellants,*

*vs.*

ELBERT G. CHANDLER and  
NORTHWESTERN EQUIPMENT  
COMPANY, a corporation,

*Appellees.*

Upon Appeal from the District Court of the United  
States for the District of Oregon.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

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## QUESTIONS INVOLVED.

Is United States Patent Number 1,140,875, issued  
May 25, 1915, to Elbert G. Chandler, for improvements  
in LOGGING TRUCKS, valid?

- (a) Did the improvement involve invention?
- (b) Was Chandler the first inventor thereof?

The opinion of the court below (Record, pages 27-34), very clearly and with *expressed satisfaction*, decided these questions in the affirmative.

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A strong prima facie case was created by the issuing of the patent soon after the application was filed, without any change therein, other than the addition of the fourth claim, submitted in connection with an argument (R. 68-70), pointing out to the Examiner why the Magor patent cited by him had no bearing whatever on the invention involved in the application. As stated in *Streaton v. Wire-Glass*, 97 Fed. 950; 38 C. C. A. 573, "*The patent carries with it the presumption of novelty, and the trained experts of the patent office have decided that what was done arose to the dignity of an invention.*"

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Again, as stated by this Honorable Court in *Morton v. Llewellyn*, 164 Fed. Rep. 692:

"Apart from the presumption of novelty that always attends the grant of a patent, the law is that where it is shown that a patented device has gone into general use, and has superseded prior devices having the same purpose, it is sufficient evidence of invention in a doubtful case."

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The invention here involved won in competition with other devices for the same purpose. It was so satisfactory that defendant would not have the others. Defendant himself says (R. p. 101):

*"Before that I had never seen or heard of any logging trucks of that kind; I was in the logging business about thirty years; it was quite a radical departure from anything of the kind made before; it was quite a difficult problem always to haul long logs without having them to interfere, and we had lots of difficulty; going around the curve the draw-bar would hit the logs and tip the car over or throw it off the track; these trucks with a high and low draw-bar was a very clever solution of the problem. I don't know how we would get along without it in the present system of logging."*

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The invention here involved is best explained in a part of the specification, copied from the patent (R. 46), as follows:

"My invention relates to logging trucks, such as are used in pairs for hauling long logs, one truck being placed under each end of the log. It is quite common for these logs to be as much as *ninety feet long*, and because of their length, and the distance between the trucks, which must necessarily be placed near the ends of the logs, said logs sag in the middle sometimes low enough to almost engage the track. Because of this sagging, the logs frequently engage and rest upon the inner

ends of the truck frame, and the draw-bar thereof, and thus operate to prevent the trucks from turning under the log-bunk thereupon, which frequently results in the derailment of a truck.

The object of my invention is to provide such an improvement in logging trucks, which are used in pairs at the opposite ends of long logs, that no matter how much the logs sag between the trucks, they will not engage the truck frame, nor the draw-bar thereof. I accomplish this by constructing the trucks so that the draw-bars at the outer ends thereof are at standard height, and are adapted to be coupled to the draw-bars on standard railroad equipment, while the draw-bars on their inner, or adjacent, ends are positioned considerable lower than are the outer draw-bars, thus giving clearance for a log resting upon the car-bunks, to sag to the limit without interfering with the inner ends of the trucks or the inner draw-bars.

When returning the logging trucks empty, they are, of course, readily coupled together at their inner ends, because at their inner or adjacent ends, the draw-bars, while lower than the standard draw-bars, are of substantially the same height and can be coupled together, while the

draw-bars at their outer ends are standard height.

\* \* \*

So far as I am aware, I am the first to provide a pair of logging trucks having their draw-bars at their outer ends at standard height, and having their inner ends constructed low to give clearance for the sagging of the logs placed thereupon, with their inner draw-bars also below standard, to avoid interference with the sagging log, and thus to avoid the serious objection of the logs engaging and resting upon the inner ends of these logging bunks, and the inner draw-bars, and interfering with their following the track upon which they are to run.

What I claim and desire to secure by Letters Patent is:

1. *A pair of logging trucks having at their outer ends draw-bars at standard height, and having at their inner ends, draw - bars arranged below standard height, whereby to give clearance for sagging logs thereon, and at the same time being adapted to be coupled to each other, when said trucks are brought together."*

Claims 2, 3 and 4 are not copied herein.

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The type of truck involved herein, therefore, is a *disconnected logging truck, having draw-bars connected thereto, at both ends, and made a part thereof.*



*Connected* trucks are such as are placed under the opposite ends of flat-cars, passenger-cars, street-cars, and the like, and are thus permanently connected together by means of the car bodies. On such cars the *draw-bars are connected to the frame or body of the car*, at its opposite ends, and *are not built as a part of the truck*. The line of draft is through the car body, or car sill. It is this kind of car, or connected trucks, to which Mr. Chriswell, witness for defendant, refers in most of his testimony, and not a disconnected logging truck.

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As stated in the opinion of the court below (R. 29):

"The industry of hauling logs of *considerable length*, it seems, has sprung up recently." Up to the time of Chandler's invention these logs were hauled on flat-cars, or, on the common logging trucks having draw-bars low at both ends, thus rendering them incapable of use with standard equipment of common carriers without the use of connecting goose-necks, or other special connecting devices, not now permitted by Interstate Commerce Rules, or, they were hauled on logging trucks which had standard height draw-bars at both ends, and in which the difficulty from the sagging logs striking the draw-heads was avoided by having *high* log-bunks, or bolsters, which raised the center of gravity too high.

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The difficulty of the unusually long logs striking the inner draw-bars of the trucks and thus causing a derailment of the trucks, was first brought to Mr. Chandler's attention by his salesman, Mr. Van Cleve,



in connection with trucks which had been furnished to Clark & Wilson by Mr. Chandler's company; by the Seattle Car Company, and by The Russell Car and Foundry Company. Mr. Chandler, according to his testimony (R. 48), and the testimony of Mr. Van Cleve (R. 61), after studying the problem some time, decided that the construction of his truck would permit it, and hit on the idea of lowering one of the draw-bars of each disconnected logging truck, and then using them in pairs with the low draw-bars there between, whereby said logging trucks could be connected to each other, when empty, by means of the low draw-bars, while the draw-bars on their outer ends were of standard height. Thus each pair would constitute a unit which could be connected with standard equipment. After the conception of this idea, Mr. Chandler found that there were difficulties in the way of reducing it to practice. Disconnected logging trucks were short and the draw-bars thus arranged would be out of alignment with each other, with an indirect line of draft through the truck and *"it took time and study to work this idea out and embody it in a practical logging truck; we were working on the idea some two or three months."* (R. 48).

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After the conception of an idea, it is necessary to reduce that idea to a practical and useful form before it can be the subject of a patent, or of any value whatever, and, as the court below said (R. 31): "*\* \* \* that is exactly what Mr. Chandler has done in this case.*"

After giving full consideration to the question of mechanical skill, and to the difficulties which had to be overcome, and the manner in which they had theretofore been met, the court says (R. 30-31) :

“So that it may be seen from taking into consideration the difficulties presented, and all of them, that it required more than ordinary mechanical skill to work out the problem. Hence the idea was hit upon to lower the draw-bar at one end of each truck, and that these draw-bars would co-operate, and the outer ends of the trucks as thus combined, having the standard draw-bar, would co-operate with the ordinary flat-car.”

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The facts in this case are best had from the testimony of Mr. Chandler (R. 47-61); Van Cleve (R. 61-63); the correspondence between Chandler and Kerry (R. 52-55); and particularly by the testimony of Defendant Kerry (R. 94-104).

In this connection, the attention of the court is called to the fact that, after Mr. Kerry had cancelled the order given to Mr. Chandler, and Mr. Chandler had notified him that the idea of a high and low draw-bar was his invention and could not be built by the Seattle Car Company, and that he would have to sue them if they infringed, Mr. Kerry immediately got a bond from the Seattle Car Company to protect himself (R. 99). Thus Mr. Kerry, the defendant of record, is placed in a better position, and his testimony was more frank, and

less prejudiced, than it might have been had he felt that he, or his company, would be held responsible for the infringement. On the other hand, witnesses F. W. Chriswell and E. V. Vashon testify as employees of the Seattle Car and Foundry Company, the company which used unfair methods to get the order, and which is in fact the real defendant, because of its bond, while witness Ira L. Withrow was formerly in the employ of the Clark and Wilson Company.

Defendant Kerry's own testimony, on cross-examination (R. 99-104), (Quoted on page . . . . . of this brief), is in itself abundantly sufficient, we must believe, to cause this Honorable Court to affirm the decision of the court below. This evidence, no doubt, had much to do with causing the court below to say, "*I think the question resolves itself very satisfactorily in favor of Mr. Chandler's being the originator of the idea, to say nothing of the matter of reducing it to practice.*"

#### CHANDLER'S TESTIMONY.

Mr. Chandler very positively testified as follows:

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His Dealing With Clark and Wilson.

"In the fall of 1913, Clark and Wilson asked us, and the Seattle Car Company, and the Russell Car and Foundry Company, to send them two sets of trial trucks" (R. 47). "This we all did.

"Mr. Van Cleve, who was then our salesman, called on the Clark and Wilson Company several times during the winter

to watch the operation of our trucks and see that any small difficulties that might be encountered were taken care of. After one of his visits to Clark and Wilson camp he stated that Mr. Withrow had complained about *all of the trucks giving trouble* from the logs bellying down and hitting the inside draw-bar, and that if they bought any more trucks they would want a truck that would take care of this difficulty; we studied the matter over to a considerable extent; there were several ways in which the matter could be taken care of, but most of them had some objection, either to the Interstate Commerce rules for common carriers, or some other objection, and all of them were discarded; *we finally decided that the construction of the truck would permit us to use the idea of a high-low draw-bar*; that is, a draw-bar of standard height on the outside to connect with the standard equipment which was already on the road, and we hit on the idea of lowering the other draw-bar to a considerable extent below that point to take care of any bellying down that the logs might have during the transportation; there were some difficulties that we ran up against in the construction, but these were mechanical difficulties that we finally overcame. The next time Mr.

Van Cleve called upon Clark and Wilson *he told them that we would in the future be prepared to furnish them with trucks having a draw-bar of standard height on one end and a draw-bar of considerable lower height on the other side*; Mr. Van Cleve stated that Clark and Wilson told him that if we could build them cars with a high-low draw-bar, that was the kind of truck they would want; that Mr. Withrow, or anyone connected with Clark and Wilson, *did not suggest to me the idea of a high draw-bar at one end of a logging truck and a low draw-bar at the other end*. I worked that idea out after Mr. Van Cleve reported the objections made by Mr. Withrow; it took time and study to work this idea out and embody it in a practical logging truck; we were working on the idea some two or three months; that in the past there had been logging trucks built with draw-bars having a standard height of  $34\frac{1}{2}$  inches above the top of the rail and logging trucks with draw-bars having a lower height at both ends, the draw-bars on either end being at the same height but in different cases this height varied, being sometimes 26 inches and sometimes  $34\frac{1}{2}$ , and sometimes between those heights to suit the individual requirements of the

particular case, but in no case did the logging truck have a coupler at one end at a considerable distance above that on the other; the draw-bars were in alignment so that the line of draft was direct; in the past they have taken care of the difficulty of these sagging logs in some cases by using a very low draw-bar on either end of the truck and using a goose-neck to connect it with the higher draw-bars on the standard equipment, the logging trucks having low draw-bars on both ends; in some cases the height of the bunk has been raised far enough above the draw-bars to give clearance while the logs were being transported."

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### His Dealing With Mr. Kerry.

"That in November, 1914, I think it was, Mr. Kerry (defendant) wrote us a letter stating that in the early part of 1915 he would be in the market for forty sets of logging trucks, and that he was asking the Seattle Car Company and the Russell Car and Foundry Company, as well as ourselves, to send down a sample truck which he could use and decide which truck was best for his service, and on receipt of his letter *I wrote him and asked him if he would allow us to send him a new type of truck*



*which we had developed having a high-draw-bar on one end and a low draw-bar on the other, and we set forth in this letter the advantages this type of construction had; this was around the latter part of November; Mr. Kerry answered that he would be glad to have us send this truck, and that with the long logs which he was going to handle the trucks would certainly need all the clearance that we could give them; we sent down a set of sample trucks having this idea of the high-low draw-bar embodied in it; the other companies sent sample trucks having draw-bars of standard height, 34½ inches on either end, and all three trucks were put into service; after Mr. Kerry had tried out the trucks I went down there one day, and he gave me an order for forty sets, and five days after that he came to town and stated that representatives of the Seattle Car Company had been down to his place and made him a considerable lower price and offered to build him the identical truck of which we had sent down sample, and that as they were willing to build this truck at a lower price than we had taken the order for he felt at liberty to cancel the order, and that he would allow us to furnish twenty sets of the trucks at the same price quoted by the Seattle Car Company, and if we didn't*



want to do this he would have to give them the entire order."

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Thereupon, in response to questions by the Court, the attorney for the defendants stated defendants were using trucks built by the Seattle Car and Foundry Company having one draw-bar of standard height and another below standard height.

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"We filled part of the order furnishing twenty pairs of trucks; the price we gave Mr. Kerry on the original order of forty trucks was \$700 per set, and the price we were compelled to take on the twenty sets was \$625 a set, being a reduction of \$75; the twenty sets that we furnished cost us \$614 a set; I have seen the trucks furnished to the defendants by the Seattle Company, and they are similar to our truck, having high draw-bar and the low draw-bar. At the time Mr. Kerry informed me that he would have to place his order with the Seattle company, *I notified him verbally that this was my invention and afterwards notified him by letter and he told me that he had secured a guaranty from the Seattle Car and Foundry Company against loss through infringement on our truck or any other; the other companies did not furnish sample trucks with the high and low draw-bars,*

*but furnished standard trucks, that is, with standard draw-bars at both ends; Mr. Kerry did not suggest this idea to me, nor did anyone else; I worked that out as a solution of difficulties which had been reported by our salesman; after getting the order from Mr. Kerry, and before receiving the notice of cancellation, we had ordered such parts as we did not already have in stock to fill the order for forty sets of trucks; Mr. Kerry knew that I had applied for a patent; I notified him before we had received the patent that we had applied for one, and also after the patent was issued; I notified him after receiving the formal notice of allowance of the application."*

The letter from Mr. Kerry of November 14, 1914, to Mr. Chandler's company was introduced in evidence (R. 52), and is as follows:

"Clatskanie, Ore., Nov. 14, 1914.  
Northwestern Equipment Co.,  
Portland, Ore.  
Gentlemen:

Some time in February, 1915, we will be in need of 40 sets of disconnected 100,000 capacity standard height logging trucks. We are asking the Seattle Car and Foundry Co., the Russell Car & Foundry Co. and yourselves to furnish one set of these trucks, each naming a

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Columbia &amp; Nehalem River R. R.,

.....

(R. 53), in part as follows:

## Logging Trucks.

used the standard height coupler on their trucks and hauled very long logs the logs bellied down and interfered with the inside coupler, and *they told us that if they ordered any more trucks they would want us to furnish them a truck having the outside couplers of standard height and the inside couplers 10 inches lower.* I am making a sketch to explain more fully the point that I am trying to bring out, and if after thinking this over you decide that you would like to have us send you a set of trucks in which the couplers are of different heights, we would be glad to do it.

As long as you are getting three different types of truck, it might be a good idea to embody as many ideas as you could in the three sets and then make up your own design from the three and let everybody bid on them, as all of the manufacturers can build any type of truck which you desire."

Attention is called to the fact that in the body of Mr. Chandler's letter he refers to "types" of trucks. This, of course, refers to the general construction and arrangement of the frame and springs of the truck. This will be clear from the following paragraph of his letter in which he refers to "*arch bar truck*" and in which he also refers to a "*cast steel frame truck*."

Mr. Kerry replied November 21, 1914 (R. 55), as follows:

"Answering your favor of recent date in regard to logging truck. You are no doubt right about the inside draw-head. All of our disconnected cars will be used *for hauling long stuff and would be a failure if the log got on the draw-head.* We have asked the others to figure on automatic couplers which are to be provided with slot with link and pin."

This letter from Mr. Kerry clearly indicates that high and low draw-bars on a disconnected logging truck was a new idea to him, and his testimony very forcibly confirms this, for he says (R. 103):

"I don't think I ever suggested the idea of this high and low draw-bar before Mr. Chandler suggested it to me; that letter will indicate that I didn't, although I may have asked Mr. Clark; *Chandler told me about Clark & Wilson's difficulty in a conversation I had, and it may have been the results of our conversation that he wrote that letter. If Mr. Chandler said he told me that he had brought out the high and low draw-bar as a solution of difficulties which Clark & Wilson were having, I would believe it. I don't remember.*"

Mr. Chandler's testimony on cross examination simply confirms his direct testimony. On redirect

examination (R. 61), Mr. Chandler clearly distinguishes between disconnected logging trucks of the character here involved, and the construction of street-cars, flat-cars, freight-cars and passenger-cars, which defendants have brought into the record, first in their answer and then in the testimony of their witness, F. W. Chriswell, but who on cross examination says that (R. 89):

*“ \* \* \* in these cars there was no coupling or draw-heads on the inner ends of the trucks; they were connected by the beams or by the body of the flat-car; in the hobble skirt car there was no coupling or draw-head on the inner ends of the trucks; they were also connected by the body of the car; in all of these cars referred to in the dictionary the construction is the same, the trucks being connected by the bodies of the cars; the draw-heads are placed centrally of the car, longitudinally but not transversely.”*

And then on page 90 of the Record Mr. Chrismell further says:

*“We have never built disconnected logging trucks with the high draw-bar at one end and the low draw-bar at the other until Mr. Kerry was in the market for them.”*

And on page 91 he further says:

*“Mr. Kerry informed us that he could get these trucks from the Northwestern Equipment Company with high and low*



*draw-bars; at that time the sample trucks had already been furnished; I had seen them and thought they were a practical truck well designed for taking care of long logs, and IN ORDER TO GET THE ORDER we told Mr. Kerry that we could build him the same kind of truck."*

MR. VAN CLEVE'S TESTIMONY (R. 61-63):

"I am fifty-four years of age, live at Elko, Nevada, and at the present time am master mechanic for the Western Pacific Railway; I was employed by the Northwestern Equipment Company of Portland, Oregon, as salesman from January 1st, 1913, to about December 1st, 1914; I called on the Clark & Wilson Lumber Company several times. The chief objects of these calls was to watch the service given by two sets of our logging trucks which the Clark & Wilson Lumber Company had purchased and was using. I talked with Ira Withrow. Until their purchase of our trial sets of logging trucks as well as two or more sets of other manufacture, they had been handling their logs entirely on flat cars with couplers of the Master Car Builders standard height; this made it necessary to give them a logging truck with a coupler of Master Car Builders height, so the logging trucks could be used in connection with the flat



cars. The Master Car Builders standard height of couplers is in the neighborhood of a foot as near as I can recall higher than the coupler of the ordinary logging truck. The Clark & Wilson Company was at this time making the practice of getting out and moving their logs in full lengths, and Mr. Withrow explained to me that these very long logs on account of their sagging down of their own weight, between the trucks, which were placed under either end of the log, were giving trouble striking the inside coupler. It was my practice to report any such troubles or difficulties to our Manager, Mr. Elbert G. Chandler. I reported to Mr. Elbert G. Chandler that the inside couplers of the Clark & Wilson Lumber Company's logging trucks were giving trouble by striking the long logs they were handling on account of these logs sagging down between the trucks. Mr. Chandler solved the troubles which I reported to him the Clark & Wilson Lumber Company was having with the high couplers on our logging trucks. On one of my trips I advised Mr. Withrow, the representative of the Clark & Wilson Lumber Company that I had reported this trouble to Mr. Chandler, and he had developed a truck with one high and one low coupler which would entirely do away

with this trouble. His reply to this information, as near as I can recall was, *'If you people can furnish that kind of a logging truck, that is the kind we want.'*"

#### DEFENDANT KERRY'S TESTIMONY (R. 94-104)

Mr. Kerry is president and manager of the Columbia and Nehalem River Railroad. On direct examination he says:

*"I cannot remember exactly when this idea of the construction of a detached logging truck with one draw-bar higher than the other was first suggested to me; I think it was sometime in the Fall of 1914; my first intimation came to me, I think, from Mr. Clark; I am not positive about that; I mean Mr. Clark, of Clark & Wilson; I was casting around for logging trucks and made inquiry from Mr. Chandler, of the Northwestern Equipment Company, and Mr. Piggott, of the Seattle Car and Foundry Company, and Mr. Brown, of the Russell Car & Foundry Company."*

Speaking of the difficulties experienced by the logs catching the draw-heads of cars then used, Mr. Kerry says (R. 95):

*"I would not be positive about Mr. Clark having said to me that I should have the inner draw-bar lowered at that time, but I am under the impression that*

he did; that was in the Fall of 1914; in sending out my written inquiries *I did not specify the high and low draw-bars.*"

It would seem certain that Mr. Kerry would have specified in his letter of November 14, 1914 (R. 52), asking for samples, that the samples should have standard height draw-bars on their outer ends and low draw-bars on their inner ends, if he had known of it. His reply (R. 55), to Mr. Chandler's letter suggesting this construction, establishes the fact that it was a new idea to him.

Testifying in regard to Chandler's sample cars, Mr. Kerry says (R. 96):

"Mr. Chandler's car came and *it was just exactly what we wanted*; the inside draw-head was sufficiently low to haul these long logs, and the outer draw-head was standard to connect with standard coupling; this was the sample set of trucks furnished by Mr. Chandler received about the same time that I received one from Seattle; I think Mr. Chandler's came a little ahead of the Seattle truck. *The Seattle car had both draw-heads the same height*, and the Chandler car had one low and one high; this was probably in February, perhaps in January, 1915; it was some time after that, probably in February, that *I gave the order for the forty cars.*"

Testifying in regard to the price made by Mr. Chandler, Mr. Kerry says (R. 97):

" \* \* \* the price was *so attractive* that I made up my mind that I would take the new stuff and discard the old; the original bid these three different concerns made was for a 100,000 capacity and not for 60; Mr. Chandler talked to me, and *I practically gave him the order*; he was to consult with his superiors and let me know in a day or two, but just before leaving the office he said, 'We will furnish them, I am sure of that.' That order was for cars with one draw-head low and the other high, new 60,000 capacity cars."

Seattle Car Company's Representative Calls on Mr. Kerry (R. 97-98).

"Within forty-eight hours afterwards the Seattle Car Company's representatives called on me and insisted they had not been given a fair deal because they had not had an opportunity to bid on a 60,000 capacity car, and they didn't think, in justice to them, we should award the contract to Mr. Chandler; that they should at least have half of the cars, and they made me a price that was *still a little better* than the price that was made by Mr. Chandler, and *I divided the order*. I telegraphed Mr. Chandler and told him, under the circumstances I thought it was

my duty to divide the order; *I gave Mr. Chandler one-half of the order and the other half to the Seattle Company; they were to construct their cars with a low draw-head on the inside.*" Chandler's intention copied.

Referring to the cancellation of the order given by Mr. Kerry to Mr. Chandler and the agreement of the Seattle Car and Foundry Company to build the trucks according to the sample of Mr. Chandler's new truck with high and low draw-bars, Mr. Kerry says (R. 98-99):

"I could not give you *the date* when he (Chandler) first notified me that he claimed the exclusive patent right to this type of cars, but *he notified me that he was going to sue us on account of the infringement of his patent by the Seattle Car & Foundry Company—that he had taken a patent on that car—and I immediately got a bond from the Seattle Car Company to protect me in these patent rights; also from Mr. Chandler; I could not tell without looking up my records how long this was after I gave the order.*"

On cross examination Mr. Kerry, referring to his letter of November 14, 1914, above referred to (R. 52), testified as follows (R. 99-103):

"That letter is similar to the ones which I sent these three different companies, notifying them that I was in the market

for cars; practically the same was sent to all of them—I think exactly the same. I can not remember when Mr. Chandler wrote me in reply to this letter that he could furnish a logging truck with high and low draw-bars, but I think he told me because Mr. Chandler was very resourceful in things of that kind. He was giving information all the time; we had several conversations about it; I am quite sure that I received the letter of which Complainant's Exhibit 3 is a carbon copy, and in reply I wrote the letter marked "Complainant's Exhibit 4;" I do not think that this letter was the first time the idea of a logging truck having a high draw-bar at one end and a low draw-bar at the other was brought to my attention; he says, "They (Clark & Wilson) told us that if they ordered any more trucks they would want us to furnish them a truck having the outside couplers of standard height and the inside couplers ten inches lower."

\* \* \*

"Mr. Clark did not say anything how the idea of a high and low draw-bar was brought to his attention."

\* \* \*

"I think I mentioned to all of these gentlemen that the trucks would have to give a certain clearance, and they were figuring on eleven inches of clearance,



and *I expected to leave that to their ingenuity as to how they would arrive at it.*"

\* \* \*

"Our outer coupling had to be standard height and the point I had in mind was a certain distance between the top of the bunk and the coupler to be given either by raising the bunk or lowering the draw-head, or any way they had in mind to figure it out; I don't remember all my conversation with the different companies, but I think probably I discussed that point with most of them; anyway, *I am sure I discussed it after Mr. Chandler and myself talked it over; Mr. Chandler was the first to definitely bring to my attention a plan of that kind; and he told me they could work it out and make a success of it; that was the sample he furnished me, and it was very satisfactory; the samples furnished by other companies were of standard height; the Russell Company did not have an opportunity to furnish me a high and low draw-bar; they brought one down there and tried to reconstruct that one, but could not.* \* \* \*

"I think the price per set at which Mr. Chandler offered to furnish his trucks was \$725. for the pair of trucks; I think \$625 was the price made by the Seattle Company; I divided the order and gave



the Seattle Company an order for twenty trucks and Mr. Chandler an order for twenty; *The Seattle Company furnished me twenty sets of trucks similar to the ones furnishd by Mr. Chandler, and I am using them and they are all satisfactory; before that I had never seen or heard of any logging trucks of that kind; I was in the logging business about thirty years; it was quite a radical departure from anything of the kind made before; it was quite a difficult problem always to haul long logs without having them to interfere, and we had lots of difficulty; going around the curve the draw-bar would hit the logs and tip the car over or throw it off the track; these trucks with a high and low draw-bar was a very clever solution of the problem. I don't know how we would get along without it in the present system of logging. \* \* \** The particular feature which we wished in both logging trucks was the high draw-bar and the low draw-bar; we simply had to have it or we could not log the way we were going to log; we would either have to use a separate draw-bar, what we called raisers, to connect with foreign equipment, or we would have to have the high draw-head on the outside, otherwise our equipment would not connect with the S. P. & S. equipment; I don't think I ever

*suggested the idea of this high and low draw-bar before Mr. Chandler suggested it to me; that letter will indicate that I didn't, although I may have asked Mr. Clark; Chandler told me about Clark & Wilson's difficulty in a conversation I had, and it may have been the results of our conversation that he wrote that letter. If Mr. Chandler said he told me that he had brought out the high and low draw-bar as a solution of difficulties which Clark & Wilson were having, I would believe it. I don't remember.*

RE-CROSS EXAMINATION OF MR. KERRY  
(R. 103-104).

*"Upon re-cross examination the witness testified that if he did not have one high draw-bar and one low he would be put to a great deal of inconvenience in hauling these logging trucks with standard equipment; that his road is a common carrier road and will do a lot of business besides logging business; that an ordinary logging road would not need the high and low draw-head because there is some little objection to it; that if the two cars forming a set get separated they must come together; you cannot take the half of one car and use it with the same half of another car, and as a result, you occasionally have two cars laid up when you*

*might have one if they were all low; if the draw-heads were all the same you could switch them around and use one-half of the car with half of another, while with the different heights of draw-bars all the cars must be together—each is a pair and inseparable. If we wanted to, we could couple a pair between every other flat car or every other box car or every other passenger car, of standard equipment.”*

#### MR. IRA L. WITHROW'S TESTIMONY.

Mr. Withrow's testimony, we submit, helps to establish the following facts: The difficulties which the logging companies were experiencing in trying to haul *very long* logs; the merit in the idea of a disconnected logging truck having a high draw-bar at one end and a low draw-bar at its other end, whereby two of them can be used together as a unit; *that no one connected with this case, other than Mr. Chandler, ever gave any thought or made any sketches in an endeavor to embody the invention in a practical and usable form.*

Mr. Withrow testifies (R. 63) as follows:

“I remember the occasion when the Northwestern Equipment Company, and certain other companies, furnished Clark & Wilson some sample logging trucks along about the Fall of 1913 \* \* \* ; we were hauling long logs at that time and *we experienced difficulty by reason of the interference of these long logs with the in-*

*ner draw-bars of these trucks; \* \* \* I had a conversation with Mr. Van Cleve, the salesman of the Northwestern Equipment Company, regarding that question; he was there one day and we were having trouble with the trucks, and I told him he would have to do something and that the proper way to do would be to drop the draw-bars, and he said that as we had the standard coupler flat-cars on the outside—he looked it over and thought it would be a good idea.”*

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#### CROSS EXAMINATION OF MR. WITHROW (R. 65).

While Mr. Withrow claims to have suggested the idea of the high and low draw-bar, he says:

*“I never made any sketches of it; I just told him it could be done; we were looking at the trucks one day there—there was no way decided on how it should be done; I am quite positive that that idea came from me, and I suggested it to Mr. Van Cleve.”*

He also testifies:

*“We said that we wouldn't buy any more unless this was done; that we would order no more trucks without the inside draw-bar being lowered; we never bought any after that; we had these ordered at the time this came up with the standard*

draw-bar at both ends; the cars were delivered probably *three or four months after that*, but *we didn't have this idea embodied in them because they were ordered before this question came up*; they were ordered from the Seattle people *with the standard draw-bar at each end*; *we never wrote them to see whether it would be possible for them to change*; *we never had any logging trucks with draw-bars arranged one high and one low*; we never have ordered any trucks since that time; the *Seattle trucks which were furnished us had the standard draw-bar at both ends*; I talked about this idea with Mr. Vachon of the Seattle Car and Foundry Company one day during his visits down there; *it was some time last Summer that I first learned that the Northwestern Equipment Company was furnishing logging trucks with high and low draw-bars*; I think it was Mr. Clark who called it to my attention; we never ordered any trucks from the Northwestern Equipment Company *except the two sets we got on trial there*; the suggestion that these trucks could be made with high and low draw-bars was made when Mr. Van Cleve and I were talking about it that day; *I do not remember that Mr. Van Cleve called on me afterwards and told me that they were in a position to furnish us*

trucks having high and low draw-bars; he called on us quite frequently at first to see how the trucks worked; we had his trucks against the Seattle people's trucks and the Russell trucks, and I notified him that we were having this difficulty with all trucks—the long logs interfering with the draw-bars; that was a common objection with all logging trucks having a standard height; we never used the low trucks; I told the Seattle Company it would be a good idea to have trucks built that way to lower the draw-bars; I told them that along in the Spring of 1914, I could not say just when, but it was during some of their calls; we just talked about it, that it should be done on account of the long logs sagging; we are hauling long logs at the present time and still using trucks with both high draw-bars; we find we have trouble on account of interference by the logs, but we are getting along with the ordinary high trucks with high draw-bars; we have had accidents caused by the logs sagging down on the draw-bar, but have not taken any steps to have the trucks reconstructed by lowering the draw-bars, but if we ever ordered any more trucks we would order them with the low draw-bar at one end; this would require considerable reconstruction on a car of THIS TYPE after they are already built."



*"I didn't suggest any way of doing that no more than just dropping the draw-bar, after I talked with Mr. Van Cleve about it I took it up with the Seattle Car Company; it was along about the time we talked about it—there was nothing said in the order—the order was in; it was about three months after this conversation with Mr. Van Cleve that we received the order from the Seattle Company; we didn't take up with them the question of making those trucks with the low draw-bar; the order had been placed and we let it pass; we have no trucks with the low draw-bar."*

It seems very strange if Mr. Withrow knew about the high and low draw-bar idea at the time they were experiencing so much difficulty with long logs and with an order for other logging trucks placed with the Seattle Car & Foundry Company, that no steps were taken to see if these trucks which were being made could not be changed, or so constructed as to embody the improved idea of the high and low draw-bar. He says the trucks were not delivered for three months or four months afterwards. Mr. Van Cleve and Mr. Chandler both very definitely testify to the fact that *the difficulty only* had been discussed, and that the idea of the high and low draw-bar was not suggested until Mr. Chandler in his study of the problem of solving the difficulty "*hit on the idea*" of lowering one of the draw-bars on each truck and then using them in pairs with



the low draw-bars therebetween and the high draw-bars at their outer ends.

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MR. F. W. CHRISWELL'S TESTIMONY (R. 81-94)

Mr. Chriswell is engineer for the Seattle Car and Foundry Company, the company which, after seeing Mr. Chandler's sample truck, offered to build the same kind of a truck for less money in order to get the order from Mr. Kerry. He says:

"My company constructed for the Columbia and Nehalem Railroad twenty logging trucks having one draw-bar higher than the other; \* \* \*

*"March 16, 1914, I was at the camp of the Clark & Wilson Company with Mr. Vachon and Mr. W. W. Clark. We met Mr. Withrow there and they had various trucks in service, the Northwestern, our trucks and the Russell trucks, and we were discussing the merits of the trucks and Mr. Withrow called attention to the fact that the sagging of the logs interfered with the coupling, and said in order to make them serviceable for hauling long logs the inner draw-bar would have to be lowered; he offered no suggestion how it could be done."*

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Attention is called to the fact that this visit of Mr. Chriswell to the camp of Clark & Wilson Company, March 16, 1914, was after the dealings of Mr. Chandler

and Mr. Van Cleve with the Clark & Wilson Company, which was in the Fall of 1913 (R. 47). Mr. Chriswell further testifies that:

"This question of the high and low draw-bars next arose when Mr. Kerry was in the market for trucks and our General Manager was down there at Mr. Kerry's camp; when he returned he told me that *we would have to build Mr. Kerry's trucks in that way* (he had seen Mr. Chandler's sample). I explained to him at the same time that this sample truck—*it would be difficult to make the change at that time*; it would involve pattern changes and would make a delay in delivering the truck, so he said he would furnish the trucks just as they are, and *if we get the order then we can make the change* \* \* \* (R. 83); between the time we commenced manufacturing these trucks and the time that I learned of the application of Mr. Chandler for a patent I was out at the plant of the Northwestern Equipment Company and met Mr. O'Brien, their superintendent; I believe this was in the early part of April; *they were building Mr. Kerry's trucks at that time*, and Mr. O'Brien asked me, 'Are your trucks just like these?' I said, 'Virtually the same. There may be a few details, but in *type* they are the same thing as your trucks.' We were referring then

to the trucks with high and low draw-bars; he did not at that time inform me that Mr. Chandler, or his company, made any exclusive claim to the right to manufacture such trucks \* \* \* ; Mr. Chandler was in our office with two of the 'Twohys, and we discussed the trucks and the price, but nothing was said during the conversation about patent or anything of that kind then; this was in our office at Seattle; we didn't show them the kind of trucks we were making; I can't say positively whether or not I showed him the drawing, but I don't suppose I did; I don't know that anything was mentioned regarding the high and low draw-bar; I can not say positively whether Mr. Chandler knew at that time that we were making trucks with high and low draw-bar, only the fact that he knew they were similar."

Court: "You didn't intend then to divulge to him that you were making such trucks?"

"It was not that we didn't wish to divulge to him that we were making these trucks, but simply it *didn't occur* to us that there was anything patentable in the idea, or that there was any question about that; it was common practice to make *cars* with high and low draw-bars."

Mr. Chriswell then gives a great deal of testimony regarding the general construction of cars, such as flat-cars, street-cars, passenger-cars, and even locomotive couplers, in an endeavor to confuse trucks constructed for use on flat-cars, street-cars, passenger-cars, and the like, in which the trucks are connected by the body of the car, and in which the couplers are placed, not upon the trucks, but into the opposite ends of the car bodies under which the trucks are mounted. This testimony, however, is not pertinent to the issue of this case, for Mr. Chriswell himself has to admit on cross examination that all of this testimony refers to car construction and not to disconnected logging truck construction.

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On cross examination (R. 89), Mr. Chriswell admits that the cars

"which they constructed in 1910, were flat-cars, and one was a logging *connected truck connected by continuous timbers*; they were cars made up in permanent forms with trucks at the opposite ends which were connected together by the bodies of the cars \* \* \* ; in these cars there was no coupling or draw-heads on the inner ends of the trucks; they were connected by the beams or by the body of the flat-car; in the hobble skirt car there was no coupling or draw-head on the inner ends of the trucks; they were also connected by the body of the car; in all of

these cars referred to in the dictionary the construction is the same, the trucks being connected by the bodies of the cars \* \* \* (R. 90); *we have never built disconnected logging trucks with the high draw-bar at one end and the low draw-bar at the other until Mr. Kerry was in the market for them \* \* \**; I didn't see Mr. Kerry myself, but our general manager told me he spoke to Mr. Kerry about constructing a truck with the high and low draw-bar; *it was not a common practice, and I didn't wish to introduce anything that was out of the ordinary in the line of construction; we wanted to avoid multiplicity of designs and patterns as much as we could. It was a departure; I didn't have any conversation with Mr. Kerry; Mr. Kerry informed us that he could get these trucks from the Northwestern Equipment Company with high and low draw-bars; at that time the sample trucks had already been furnished; I had seen them and thought they were a practical truck well designed for taking care of long logs, and in order to get the order we told Mr. Kerry that we could build him the same kind of truck \* \* \*;* we furnished twenty logging trucks to Mr. Kerry with the high and low draw-bars."

## MR. E. V. VACHON'S TESTIMONY (R. 104).

Mr. Vachon is also a representative of the Seattle Car & Foundry Company. Regarding the question of the high and low draw-bar and a discussion between Mr. Chriswell and Mr. Withrow, he says:

*"I don't remember just the conversation, but the substance of it was that some arrangement should be made to provide for that, and the practical way seemed to be to lower the couplers on the inside so that they would not interfere, causing accidents or anything of that kind.*

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On cross examination Mr. Vachon's memory was not very good. He says:

*"Mr. Withrow suggested that this lowering of the couplers on the inside was the practical way; I do not remember his exact words; it was just to the effect that the coupler should be lowered at the inside to take care of that; he thought that was the practical way of obviating the difficulty; this was in the early part of 1914; he did not suggest any way of doing it, he didn't go into the technical part; he suggested that it might be the practical way, as I remember his suggestion—it would be the practical way, or something to that effect, I don't just remember the words; I don't think he suggested any*



other solution; *I do not remember* that he made any statement that the Northwestern Equipment Company could build that kind of a car."

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It is to be noted that all of these various conversations between Withrow, Chriswell and Vachon were subsequent to the Fall of 1913, when the difficulty of handling long logs was first experienced by the Clark & Wilson Company in connection with trial trucks which it was using. There can be no question about the first suggestion of the high and low draw-bars on a disconnected logging truck coming from Mr. Chandler, who was the first, not only to conceive the idea, *but he was the first to reduce that idea to practice*. The Seattle Company copied it.

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The attention of this Honorable Court is especially called to the fact that defendants below, though claiming to have made "suggestions" of the idea involved in this case, *never made any attempt whatever to reduce the idea to practice until after they had seen Mr. Chandler's sample trucks on which, in competition with their sample trucks having draw-bars at the same height, the order was first given to Chandler*. Referring on this point again to the opinion of the court below, he says (R. 32):

"The question has been argued here as to who first suggested this change in the apparatus which finally brought about the issuance of the patent. There is some

question in the testimony as to whether the idea was first suggested by Mr. Chandler, or whether by Mr. Withrow. Mr. Withrow claims that he made the suggestion in the first place. Mr. Chandler thinks that he was the first one to suggest it, or that the idea came to him first. Mr. Chandler is corroborated by the testimony of Mr. Van Cleve very pointedly. But, taking into consideration the testimony that *Mr. Chandler entered at once upon the completion of his design, so as to put it into proper arrangement for use, and that Mr. Withrow allowed the matter to rest and made no effort toward a completed design for useful purpose, and taking into consideration also the other testimony in the case, that, after Mr. Chandler had perfected his design, constructed a car, and supplied one of those cars to the defendant company, then the Scattle Company, seeing that design, offered to make a car of the same design and to sell it to the defendant company, I think the question resolves itself very satisfactorily in favor of Mr. Chandler's being the originator of the idea, to say nothing of the matter of reducing it to practice."*

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Referring now to the Magor Patent No. 951,253 (R. 72), this is the patent which the Patent Office at

first thought might anticipate Chandler's idea. By reference to Fig. 5, however, of the drawing, it will be clearly seen that these draw-heads S—S, are at the same height and are in direct alignment with each other. The line of draft is direct. The reasons why this Magor patent did not anticipate Chandler's idea are set forth in attorney's argument to the Patent Office (R. 68-70), which explanation was entirely satisfactory to the Patent Office experts, for the patent was thereupon issued.

A study of the specification and claims of this Magor patent, will convince the court that here, too, is a patent for a seemingly simple improvement, but one which overcomes difficulties and operates with greater safety. Claim 3, for example, is as follows:

“In a car truck, the combination of a bunk to receive the load, and draft rigging pivoted thereto.”

But, as said in *Pettibone v. Pennsylvania Steel Co.*, 133 Fed. Rep. 730 (737):

“He was the first to so arrange this old and well-known piece of machinery to bring the result required. The changes made were slight, and apparently of not very great importance in each particular piece, but when combined by Strom the very slight change made in each one of the parts where change is found, resulted in effecting a result which is shown to have been unknown and not accomplished by any other before the patentee.

There are numerous cases supporting inventions of this kind. It is only necessary, in support of this patent as against those cited as anticipations, to refer to *Brill v. Third Ave. R. R. Co.* (C. C.), 103 Fed. 289."

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The Komarek Patent, No. 1,008,921 (R. 75), was also considered by the court below, but was held not to anticipate Chandler's idea. The object of the invention covered by this patent "is to provide a log truck of simple construction which can be manufactured at a low cost." Why? "Because it consists of a *one-piece cast* metal frame having draft beams formed integral with the bolster and the front end sill of the truck." (Lines 94-99). The claims most forcibly define the object of this simple invention. Claim 1 specifies: "A log truck having a cast metal frame which consists of side sills, end sills, a bolster, and draft beams *all integrally connected together*, and pedestals secured to the side sills."

The construction of this Komarek truck clearly shows that there was no thought of having a draw-bar, or coupler, on the inner end of the frame. The inner frame is light and would not carry a coupler. This is very clearly indicated by reference to Fig. 1 of his drawings. There are lots of truck frames made lighter and lower on their inner ends. As a matter of fact, however, the front and rear end sills C and D are of the same height in this Komarek patent and are formed integrally to the side sills B. This will be un-

derstood by reference to Figs. 1 and 2. Only the middle draft sill E, which is of box-like construction, is higher than the end and side sills C, D and B—B. Fig. 2, it will be noted, is a sectional view taken on line 2—2 of Fig. 1. This patent only goes to prove that at the time of the Komarek patent it was not known to construct a log truck having a high draw-bar at one end and a low draw-bar at the other.

Would appellants also try to destroy this patent because it covers a simple idea; the idea of certain parts being "*integrally connected*" in a simply and improved construction, whereby it "*can be manufactured at a low cost?*"

The Bettendorf Patent does not refer to logging trucks at all, but to railroad car trucks and particularly to the trucks or cars from which the body may be readily lifted or tilted to one side or the other while supported thereby. The description and the claims of this patent clearly show that this is "*a cast metal truck-frame for car-trucks extending from axle to axle and from wheel to wheel.*" It is not even so constructed that an inner draw-bar or coupler could be made as a part thereof without reconstruction. It could not be used for logging. There is no suggestion of a pair of disconnected logging trucks with co-operating low draw-bars therebetween and high draw-bars at their outer ends.

*We have never known a case in which the facts and circumstances and equities were so completely in favor of the complainants below. THINK OF IT. The Seattle Car Company had furnished a sample truck in*



*competition with Mr. Chandler's company, and with the Russell Car and Foundry Company. Chandler got the order, then within forty-eight hours the Seattle Car Company came in, after inspecting Chandler's new sample truck (R. 50, and Kerry's testimony bottom pages 97-98), and offered to copy Chandler's new truck, and to furnish it for less money than Mr. Chandler's price.*

### THE LAW.

Defendants have endeavored to discredit the fact that Chandler's improved logging trucks involved invention, because the parts used in the combination, by themselves are old, and they have gone to the limit in picking to pieces the various elements involved in the combination and showing that the function of each is old. But, as stated in *Columbus v. Robbins*, 64 Fed. 384; 12 C. C. A. 174:

"Notwithstanding that fact that all the parts are old, in the sense that each of them may be found in previous patents, the combination of parts in the patent in suit brings about a new result, and involves patentable invention."

See also *Brown v. Guild*, 90 U. S. 181.

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Again, in *National v. Interchangeable*, 106 Fed. 693; 45 C. C. A. 544, the court says:

"A new combination of old elements whereby a new and useful result is produced, or *an old result is attained in a more facile, economical and efficient way*, may be protected by a patent as



securely as a new machine or composition of matter." Citing—

Seymour v. Osborne, 11 Wall. 516;

Gould v. Rees, 15 Wall. 187;

Thompson v. Bank, 53 Fed. 250.

In *International v. Dey*, 142 Fed. 736; 74 C. C. A. 68, we have:

"Strictly speaking the combinations are not, as we have seen, of old elements, but *conceding that the elements are all old*, it cannot be denied we think that the combination is not only new but *that it produces a new result, or, at least, an old result in a better way than any device which preceded it*. The elements of the combination so act that each qualifies every other and the new result is due to their co-operative action. Remove one and the machine becomes inoperative; it fails to produce the desired result.

After careful consideration, we are of the opinion that the complainant's patent relates to an article of substantial, practical merit, which excels in operation and results other existing appliances, and that the patent is valid."

*Diamond v. Goldie*, 84 Fed. 972; 28 C. C. A. 589.

"That putting a part in a secure place and out of the way may involve invention."

*Stanard v. Computing*, 126 Fed. 639; 61 C. C. A. 541.

Star v. General, 111 Fed. 398.

Cutler-Hammer v. Automatic, 159 Fed. 447; 86 C. C. A. 477.

### Ninth Circuit.

In the case of Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280; 97 C. C. A. 446, this Honorable Court held:

“A device which does not operate on the same principle as that of a patent cannot be an anticipation.” Citing—

Western Electric Co. v. Home Telephone Co., 85 Fed. 649;

Dederick v. Cossell, 9 Fed. 506;

Pattee v. Moline Plow Co., 9 Fed. 821;

Fuller v. Yentzer, 94 U. S. 288;

Topliff v. Topliff, 145 U. S. 156.

“It is not sufficient, to constitute an anticipation, that the devices relied upon might, by a process of modification, reorganization, or combination be made to accomplish the function performed by the device of the patent sued on.”

Authority *supra*.

Then in the case of Bliss et al v. Spangler, 217 Fed. Rep. 394, this court held:

“It has long since been settled that an aggregation and association of altogether old elements may constitute invention, if it escapes or rises above mere mechanical skill and produces utility

of superior virtue of that previously obtained." Loom Co. v. Higgins, 105 U. S. 580.

"It may happen that a single change in construction is productive of a marked advancement in utility, and this has been accounted novelty appertaining to invention. Citing The Barbed Wire Patent, 143 U. S. 275: \* \* \* "It is hardly probable that complainant's device, constructed and articulated as it is, is the result of mere mechanical suggestion. It is manifestly not a contrivance that the ordinary mechanic would devise in the application of known elements. Otherwise, why was it not struck upon before?"

Morton v. Llewellyn, 164 Fed. 692.

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In the famous Grant Rubber Tire case - Diamond Rubber Co. v. Consolidated Rubber Co., 120 U. S. 428, the following is held:

"It was certainly not an exact repetition of the prior art. It attained an end not attained by anything in the prior art, and has been accepted as the termination of the struggle for a completely successful tire. It possesses such amount of change from the prior art as to have received the appropal of the Patent Office, and is entitled to the presumption of invention which attaches to a patent. *Its simplicity should not blind us as to its character.* Many things, and the patent law abounds in illustrations, *seem obvious after they have been done*, and 'in the light of the ac-

complished result,' it is often a matter of wonder how they so long 'eluded the search of the discoverer and set at defiance the speculations of inventive genius.' *Pearl v. Ocean Mills*, 11 Off. Gaz. 2.

*"Knowledge after the event is always easy and problems once solved present no difficulties; indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by merely skillful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not."* *Railroad Co. v. Sayles*, 97 U. S. 554.

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In *Barry et al v. Harpoon Castor Mfg. Co.*, 209 Fed. Rep. 207 (209), the court, after referring briefly to numerous decisions upholding patentability in seemingly simple inventions, says:

"In each of these cases the invention was based upon a finding of a new use or function for structures found in the prior art. Domes, torsional springs, stays for box corners, pasting machines, collar buttons, and barbs for fence wire were all old, but those who found a new place for the old devices whereby alone, or in combination with other structures, entirely new results were produced, received the rewards of the inventor. \* \* \* It is most unsafe to refuse to

recognize invention because the device or combination is simple, for such a rule would destroy some of the most meritorious patents ever issued."

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In *Johnson v. Forty-Second St. R. R. Co.*, 33 Fed. Rep. 499 (501), the court says:

"In judging of the invention care should be taken not to underestimate its value, because the apparatus, now that we have seen it work, seems so plain and simple. The test to which this patent has been subjected—the test which is usually applied to all contested patents—is certainly severe, and is even misleading and deceptive. The defendant assembles every similar device, description, or suggestion in the prior art not only, but also in analogous, and even remote arts. Everything which has the least bearing upon the subject is brought in and arranged by a skillful expert in an order of evolution which resembles most closely the invention which is the subject of attack. *Having thus reached a point where but a single step, perhaps, is necessary to success, and knowing from the inventor exactly what that step is, the expert is asked if the patent discloses invention, and honestly, no doubt, answers in the negative. There is always the danger, unless care is taken to divest the mind of the idea added to the art by the inventor, that the invention will be viewed and condemned in the light of ascertained facts.* With his descrip-

tion for a guide, it is an easy task to trace the steps from the aggregation to the invention."

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"It may be true that Anderson has only taken the familiar contact spring or brush, and placed it in a protected position, but this change seems to have made the difference between a defective mechanism and a practical method of attaining the desired result. Where, as in this case, the departure from former means is only small, yet the change is important, *the doubt as to whether the inventive faculty has been exercised is to be weighed in view of the fact that the device in question has displaced others which had previously been employed for analogous uses, and this may decide the issue in favor of invention.*" *Star v. General*, 111 Fed. 398; 49 C. C. A. 409, citing—

*Krementz v. Cottle*, 148 U. S. 556;

*Consolidated v. Detroit*, 47 Fed. 894.

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In *O'Rourke Engineering Construction Co. v. McMullen*, 160 Fed. Rep. 933 (938), the court says:

"The principal question in such cases is: Has the patentee added anything of value to the sum of human knowledge, has he made the world's work easier, cheaper and safer, would the return to the prior art be a retrogression? When the court has answered this question, or these questions, in the affirmative, the effort should be to



give the inventor the just reward of the contribution he has made. 'The effort should increase in proportion as the contribution is valuable. Where the court has to deal with a device which has achieved undisputed success and accomplishes a result never attained before, which is new, useful and in large demand, it is generally safe to conclude that the man who made it is an inventor. 'The court may resort to strict and, it may even be, to harsh construction when the patentee has done nothing more than make a trivial improvement upon a well-known structure which produces no new result, but it should be correspondingly liberal when convinced that the patentee's improvement is so radical as to put the old methods out of action. 'The courts have frequently held that one who takes an old machine and by a few, even inconsequential changes compels it to perform a new function and do important work which no one before ever dreamed it capable of performing, is entitled to rank as an inventor.'" Citing *Hobbs v. Beach*, 180 U. S. 383; also *Loom Co. v. Higgins*, 105 U. S. 580, and quoting from page 591 as follows:

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It certainly was a new and useful result to make a loom produce 50 yards a day when it never be-

fore had produced more than 40."

Then at page 939 the court says:

"The keynote of all the decisions is the extent of the benefit conferred upon mankind. *Where the court has determined that this benefit is valuable and extensive it will, we think, be difficult to find a well considered case where the patent has been overthrown on the ground of non-patentability.*"

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In *Candy et al v. Michigan Malleable Iron Co.*, 124 Fed. Rep. 486 (493), the court says:

"We have examined the other patents shown in the record sufficient to satisfy ourselves that there is nothing else which comes nearer to the claim in the Candy Patent we are now considering than those we have enumerated. It must be admitted that, if there were no other consideration, some of the previous patents might raise grave doubt in respect to the novelty of this invention. But in aid of it stand several facts which are always persuasive in such a case. There is the presumption arising from the granting of the patent, which, in this case, was issued, as the proceedings in the Patent Office show, after full and critical examination, and this after rejections and references to previous patents of a character very similar to those we have in the present record—indeed, some of them are the same. The invention has gone into extensive use."

The invention in this case relates to the attachment at the inner end of the draw-bar in railroad cars whereby the construction is made between the draw-bar and a draught timber.

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In *Miehle Printing Press & Mfg. Co. v. Whitlock Printing Press & Mfg. Co.*, 223 Fed. Rep. 647, the Circuit Court of Appeals, Second Circuit, holds that "patentable novelty" is sometimes found in discovering what is the difficulty with an existing structure, and what change in its elements will correct the difficulty, even though the means for introducing that element into the combination are old, and their adaptation to the new purpose involves no patentable novelty.

The gist of the invention, as the patentee states, consists essentially in the use of a plane-faced actuating-block and means for maintaining it in proper position relative to the devices with which it intermittently co-operates.

Referring to the Miehle press, the court states:

"Miehle's stud was round and had a cylindrical sleeve on it to reduce friction. This had defects; or perhaps, as it may better be expressed, it was not as efficient as it might be \* \* \* .

Hodgman, while retaining the Miehle stud with its two guideways and a flight through the air between one guideway and the other, has substituted for the cylindrical sleeve a square side block, presenting long parallel sides to travel in contact with the walls of the guideways \* \* \* We

do not understand that any one contends that the Michle press is not at all improved by the use of a square-sided block; certainly defendant, which uses such a block, cannot so contend \* \* \* .

The defendant contends that it was "obvious" that the frictional roller of Michle did not provide satisfactory wearing surfaces; that it was "obvious" that this was a defect which should be eliminated; that it was "obvious" that it would be eliminated if a square-sided block were substituted for the roller, the stud and guide-ways remaining substantially the same as before.

If this be so then Judge Mayer was correct, and it is not necessary to add anything to his discussion of the mechanics of the case, because the only thing left for Hodgman to do with these "obvious" suggestions before him would be to secure right-side-up position for his squared block and two well-known mechanical devices (the "planetary gear" and the "parallel links") were available to secure it, given the appreciation of the defect and the realization that the square-sided block would remedy it, the details of the structure would seem to be within the range of the ordinary skilled mechanic, who would use either the planetary gear, as Hodgman did, or the parallel links, as defendant does.

We must admit that, looking at the situation as laymen, unskilled in mechanics, and enlightened by the situation as it is after the event, we would be inclined to agree with defendant in its statement of what was *obvious* before Hodgman

appeared. But in our opinion the record does not indicate that this is all there is to Hodgman's improvement. Past experience has shown us that what may seem *obvious* after disclosure was not *obvious* before, even to persons skilled in the art." Brunswick Balke Co. v. Thum, 111 Fed. 904, 50 C. C. A. 61; Schenck v. Singer Mfg. Co., 77 Fed. 841, 23 C. C. A. 494.

The record indicates, as it did in the cases of the sewing machine treadle and the bowling alley ball return way, that there is something about the improvement of Hodgman which marks it as an expedient—simple, no doubt—but not naturally suggesting itself to the man skilled in the art."

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"In Brunswick-Balke-Collender Co. v. Thum et al, 111 Fed. Rep. 904, the Reisky Patent Number 599,477 for improvements in Bowling Apparatus, which consists of a run-way or trough for the return of the balls, so constructed that the balls roll rapidly down the incline until near the players' end of the alley, and then up an ascending incline which gradually checks their momentum, breaks the force of their impact and prevents their injury, while apparently embodying only an *obvious mechanical expedient*, must be conceded patentable invention, in view of evidence showing that for many years mechanics had been engaged in attempts to improve the old style run-way to obviate the same defect, but

that the patentee was the first to use the double incline for the purpose, and that his invention at once came into general use.

"The facts in the case at bar are closely analagous to those which were before this court in *Schenck v. Singer Mfg. Co.*, 23 C. C. A. 494; 77 F. R. 841. The improvement consists in an extremely simple, and it would seem, perfectly obvious, application of common knowledge as to the law of gravitation. Were there nothing in the record but the bare statement of facts, above set forth, we would be inclined to concur with the court below in the proposition that:

'Had any skilled mechanic been asked to perfect a structure that should gradually arrest the momentum of the returning ball, an ascent would obviously have been the structure needed.'

But in this case, as in the *Singer* case, the evidence shows conclusively, and, indeed, without contradiction, that this very demand for an arrester of the returning balls was before skilled mechanics for many years, and yet none before Reisky hit upon the device which now seems so obvious. The defects of the old system were serious \* \* \*.

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- In *Singer Mfg. Co. v. Schenck*, 68 Fed. Rep. 191, a simple invention held valid and infringed. Evidence of prior use 30 years ago not considered good.



"The burden of establishing this defense rests heavily upon the defendant: it must be proved beyond a reasonable doubt. The wisdom of this Rule was never more apparent than in the present case. The difficulty, if not the impossibility, of procuring accurate oral testimony regarding commonplace evidence occurring 30 years ago is obvious to all."

Affirmed in 77 Fed. Rep. 841. Holding that the improvements in Band Wheel Bearings for Sewing Machines, show patentable invention as to claims 1 and 2, notwithstanding the apparently simple connection of the change made, in view of the beneficial results achieved and the obvious defects of prior constructions.

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In *Wickelman v. A. B. Dick Co.*, 88 Fed. Rep. 264 (260), the court says:

"The case is one for the application of the doctrine, well settled in the law of patents, that novelty is not negatived by a prior accident production of the said thing, when the operator does not recognize the means by which the accidental result is accomplished, and no knowledge of them, or of the method of its employment, is derived from it by anyone. (*Pittsburg Reduction Co. v. Cowles Electric Smelting & Aluminum Co.*, 55 Fed. Rep. 307). The chance operation of a principle, unrecognized by anyone at the time, and from which no information of its existence and no knowledge of a method of its employment, is derived by anyone, if proved to

have occurred, will not be sufficient to defeat the claim of one who first discovers the principle, and, by putting it to practical and intelligent use, first makes it available to man." *Andrews v. Carmen*, 13 Blach. 308. Fed. Case No. 371.

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In *Naylor v. Alsop Process Co.*, 168 Fed. Rep. 911 (920), the court says:

"When it is sought to ascertain the state of the art by means of prior patents, nothing can be used except what is disclosed on the face of those patents. Such patents can not be reconstructed in the light of the invention in suit and then used as a part of the prior art." (See Dec. Dig. Paragraph 66).

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In *Westmoreland Specialty Co. v. Hogan*, 167 Fed. Rep. 327:

"The after-discovery of unsuspected usefulness in a disclosed apparatus, far from detracting from its value, may serve to enhance it. It is the benefits which test, use, and time unfold that really determine merit. It is this after-test, the test of use, that proves the worthlessness of the great majority of patents and establishes the value of the few."

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In *Goodwin Film & Camera Co. v. Eastman Kodak Co.*, 207 Fed. Rep. 351 (360):

"The Rule is that anticipating patents and publications must disclose the invention without

patentable change or alteration to make them anticipatory."

Waterbury Buckle Co. v. Aston, 183 Fed. Rep. 120; 105 C. C. A. 410.

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From A. R. Mosler & Co. v. Lurie, 209 Fed. Rep. 364 (366-7), we quote:

"With a deliverance of the Circuit Court of Appeals for the Seventh Circuit (Gray Telephone P. S. Co. v. Baird Mfg. Co., 174 Fed. 417; 98 C. C. A. 353), we fully concur. It reads as follows:

'A patent for a mechanical combination is not anticipated by a drawing in a prior patent which incidentally shows a similar arrangement which is not essential to the first invention, and was not designed, adapted, or used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second inventor.' "

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"The first defense is based on the theory that the patents cannot be valid unless it is new in all its elements as well as in the combination. But this theory cannot be maintained. It if were sound no patent for an improvement on a known contrivance or process could be valid. And yet the great majority of patents are for improvements in old and well-known devices, or on patented inventions. *Changes in the construction*

*of an old machine which increases its usefulness are patentable."*

Cantrell v. Wallick, 117 U. S. 689. Citing—  
 Seymour v. Osborne, 11 Wall. 516;  
 Loom v. Higgins, 105 U. S. 580;  
 Hailes v. Van Wormer, 20 Wall. 353;  
 Star v. Crossman, 4 Cliff. 568.

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"He has not made a great invention or a 'Pioneer invention,' if that much-abused expression be confined to its legitimate meaning, but he has produced a novel and useful device which is far removed from mechanical skill. His invention belongs to that vast field of minor achievements which has given this country its acknowledged pre-eminence and which it is the policy of the patent law to protect."

Eldred v. Kirkland, 130 Fed. 342; 64 C. C. A. 588.

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In *Wagner Typewriter Co. v. Wyckoff, Seaman & Benedict*, 151 Fed. Rep. 585, the following is held:

"In construing improvement claims of a patent, consideration should be given to the character of the improvement introduced by the patentee, and the change in the art attributable to them. When that results in converting imperfection into completeness and in producing the first practical and commercial successful machine, however simple the change appears, the invention is entitled to liberal treatment by the court.

Courts look with favor upon patents for primary improvements which are novel and a manifest departure from the principle of prior structures, and which constitute the final step necessary to convert failure into success. A strict construction of the claims of a patent should not be resorted to, if the result would be a limitation on the actual invention, unless it is required by the language of the claim."

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In the case of *Eck v. Kutz*, 132 Fed. Rep. 758 (779), the court says:

"Inventive discovery, as was admirably said at the argument, involves the intelligent apprehension of relations not before recognized by others, although actually existing, *followed by the conception of how that can be practically utilized.*"

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In *Rose v. Hirsh et al*, 77 Fed. Rep. 469 (470), we have this language:

"We do not think the allegation that metal tubes with tapering ends, containing an equal quantity of metal throughout their length—thus having an increased thickness of walls in the tapering ends—were old is satisfactorily proved. That metal tubes with tapering ends were old, may be conceded; but that the walls of the ends were so thick is not clear. The usages for which these tubes were designed would not require such strengthening of the ends, and the surplus

metals used to produce the thickened walls would be simply wasted. If any such tubes were previously manufactured it must have resulted as an unintentional incident of the method employed in their manufacture, and not from design. Granting, however, that such tubes were recently made, the fact does not seem important. They did not constitute umbrella "sticks," nor such adaptability to its use. What Rose did was to invent and construct a metal umbrella "stick," having a new and useful feature—a tapering end so drawn down as to diminish the diameter of the tube, a part to which the "notch" is attached, without diminution of the metal, and materially increasing the strength of the "stick" where the strain upon it is greatest. We think it more deserving of a patent than much that has been adjudged patentable."

The claim in this case is as follows:

1. A tubular metal stick for umbrellas or parasols, said stick being drawn down at one end so that the tubular end portion of the stick is reduced in diameter and increased in thickness as compared with the body of the stick, substantially as described.

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Defendants have cited a number of cases in which patents have been held invalid, but an analysis of these cases shows very clearly why the devices thereof were held not to involve invention, principally because of the mere duplication of something that was done before



without any new or different result, such as placing an additional pane of glass in a Buss fare-box so that the contents of the box could be seen from both sides, as in *Slawson v. Grand St. R. R. Co.*, 107 U. S. 649; or the application of an old process to a new subject, as in *Brown v. Piper*, 91 U. S. 44; or the use of a roller with designs on it, in a combination, where it was shown that a roller without a design had been used in the same way, and also that a roller with designs on it had been used in another combination, as in *Stimpson v. Woodman*, 10 Wallace 117.

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Attention is here called to the case of *Watson v. Stevens*, 51 Fed. 757; 2 C. C. A. 500, in which the court holds:

"We conclude, therefore, that in applying to cases of doubt the primary rules touching what constitutes invention and the secondary rules touching what is a "new and useful result," a "new function," or a "new sphere of action," we may be influenced by the facts that the improvement in question, *although desired for years, was not secured until brought out by the patentee; that the product of the improved machine or process went into general use, and displaced wholly or in a very large degree, by prior products.*"

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Such are the facts in connection with the case before the court. Defendant Kerry, who has been in the logging business about thirty years, says (R. 101): "I

*had never seen or heard of any logging trucks of that kind; I was in the logging business about thirty years; it was quite a radical departure from anything of the kind made before."*

Mr. Chriswell, who has been engineer about nine and a half years for the Seattle Car and Foundry Company, says (R. 90): "*We have never built disconnected logging trucks with a high draw-bar at one end and the low draw-bar at the other until Mr. Kerry was in the market for them.*" On page 91 he also says: "*It was a departure \* \* \* ; Mr. Kerry informed us that he could get these trucks from the Northwestern Equipment Company with high and low draw-bars \* \* \* ; I had seen them and thought they were a practical truck well designed for taking care of long logs, and in order to get the order we told Mr. Kerry we could build him the same kind of truck.*"

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"The facts that its usefulness is not denied, and that the appellant has seen fit to depart from the many devices open to his use, and to adopt that of the appellee, strongly indicate that it marks a distinct and useful advance in the progress of this art."

Brammer v. Schroeder, 106 Fed. 918; 46 C. C. A. 41.

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"When the court is convinced that a meritorious invention has been made it should not permit infringers to evade the patent on narrow and

technical grounds." *Cimiotti v. American*, 115 Fed. 498, citing—

*Machine Co. v. Murphy*, 97 U. S. 120;

*Cantrell v. Wallick*, 117 U. S. 689;

*Reece v. Globe*, 61 Fed. 959.

The court, in considering this case, may very well say, as did the court in *Faries Mfg. Co. v. Geo. W. Brown & Co.*, 121 Fed. Rep. 547 (550):

"The eye that sees a thing already embodied in mechanical form gives little credit to the eye that first saw it in imagination. But the difference is just the difference between what is common observation and what constitutes an act of creation. The one is the eye of the inventive genius; the other of a looker-on after the fact."

The patent involved in this case covers an improved Knot in check-row wires, used in planting corn.

We must believe that the facts and the law and Defendant Kerry's own testimony on cross examination (R. 99-104) are abundantly sufficient to cause this Honorable Court, with satisfaction, to affirm the decision of the court below, and to further hold that the court below did err in awarding plaintiff damages in the amount of \$660.00, as stated in Paragraph 9 of the "Assignment of Errors," for the reason that Chandler's actual damages, as proved, on the one sale, was \$3,220, instead of \$220; for he had closed the deal for forty sets at \$700 per set, as proved by the testimony on both

sides. The testimony shows that it actually cost Chandler \$614.00 per set to build these trucks. The profit per set, therefore, was \$86, and on forty sets would have been \$3,440. Chandler, however, did build twenty sets at a profit of \$11 per set, or a profit of \$220, which deducted from the total loss would leave his total actual loss \$3,220. In addition to this actual loss, forced upon Mr. Chandler by an unfair competitor, he has had the long delay and expense connected with the disagreeable duty of enforcing his rights.

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We respectfully submit, therefore, that the decision of the court below upholding the validity of Mr. Chandler's patent should not only be affirmed, but that the actual damages *should be assessed as proved*, to be \$3,220, and that, because of the deliberate unfair competition which deprived Chandler of this legitimate business, said actual damages should be doubled if not trebled.

Respectfully submitted,

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